

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 32**

**SYSCO CENTRAL CALIFORNIA, INC.**

**Employer**

**and**

**Case 32-RC-272441**

**TEAMSTERS UNION LOCAL 386,  
INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS<sup>1</sup>**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

On February 9, 2021,<sup>2</sup> Teamsters Union Local 386, International Brother of Teamsters (the Petitioner), filed a representation petition, pursuant to Section 9(c) of the National Labor Relations Act (the Act), seeking to represent certain employees<sup>3</sup> of Sysco Central California, Inc. (the Employer), at its facilities located in Modesto, Sacramento, and Merced, California.<sup>4</sup> A hearing officer of the National Labor Relations Board (the Board) conducted a hearing in this matter by videoconference beginning on March 2, and the parties timely submitted post-hearing briefs.

This case presents three issues. The first issue is the appropriate unit scope. The Petitioner contends that the petitioned-for unit is a single-terminal unit. The Employer contends that the petitioned-for unit is a multifacility unit and, additionally, that the only appropriate unit must include the Employer's other facilities in Fresno and Tulare. The second issue is whether the petitioned-for unit, which is limited to delivery drivers and a backhaul driver, must include other job classifications. The Employer contends that the smallest appropriate unit must include shuttle drivers, the router, the transportation clerk, the inbound scheduler, inbound receivers, forklift putaways, forklift let-downs, outbound selectors, loaders, the quality assurance produce inspector, cycle counters, driver check-in associates, the will-call associate, fleet technician IIIs, MHE technician Is, and the maintenance coordinator. The third issue is whether to conduct a manual or mail-ballot election in light of the COVID-19 pandemic. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated to me the authority to decide this matter.

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<sup>1</sup> I have amended the parties' names to confirm with their written stipulation.

<sup>2</sup> All dates are for the year 2021 unless otherwise noted.

<sup>3</sup> The Petitioner initially petitioned to represent "all drivers, including delivery and shuttle drivers." In its pre-hearing responsive statement of position, the Petitioner requested a unit of all delivery drivers based in Modesto, Sacramento, and Merced, as well as the single backhaul driver based in Modesto; excluding all other drivers based out of Fresno and Tulare.

<sup>4</sup> All of the Employer's facilities at issue in this case are located in California.

Having carefully considered the entire record, and as further explained in this decision, I find that the petitioned-for unit of delivery drivers and the backhaul driver at the Employer's facilities in Modesto, Sacramento, and Merced is appropriate. To provide context for my discussion of this matter, I begin with an overview of the Employer's operations, including a description of each department and each job classification at issue in this case. I then consider each of the three issues—unit scope, unit composition, and election method—in turn, reviewing the applicable Board law for each issue, summarizing additional relevant facts, and discussing the law's application to the facts. I conclude with a summary of my findings.

## **I. EMPLOYER'S OPERATIONS**

The Employer operates a warehouse and distribution center at 136 South Mariposa Road in Modesto, California. The facilities consist of two large buildings: one contains the offices, a dry warehouse with loading docks, and a cooler warehouse with loading docks; and the second contains the freezer warehouse, loading docks, and other facilities. The Employer receives food items and non-food items at these facilities from third-party vendors, which it stores in its warehouse until the Employer's customers place orders for the product. The Employer then prepares the product for transport, loads it into tractor-trailers, and delivers it to customers.

The Employer has additional supervisors' offices and a domicile yard located at 2615 East Dorothy Avenue in Fresno. Domicile yards are locations where the Employer's various types of drivers begin and end their routes. Domicile yards also each have a shed where drivers store their equipment: pallet jacks, TR jacks (also called a "walkie"), and handheld devices. In addition to Fresno, the other domicile yards are located in Sacramento, Merced, and Tulare.<sup>5</sup>

The employees at issue in this case are in various departments: transportation, warehouse, inventory control/quality assurance (IC/QA), and maintenance. The Employer's vice president of operations oversees the transportation, warehouse, and maintenance departments. The IC/QA department is overseen by the Employer's compliance manager; however, the top-level supervisor over the IC/QA employees in this matter is the inventory control supervisor.

Below, I summarize the departments at issue in this case as well as the various positions<sup>6</sup> within each department.

### **A. Transportation Department**

The transportation department's principal function is the movement of product between its facilities and its customers. This transportation employees at issue in this case are delivery drivers, shuttle drivers, the backhaul driver, the router, and the transportation clerk. Four transportation

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<sup>5</sup> The record does not contain the address of the domicile yards in Sacramento, Merced, or Tulare.

<sup>6</sup> In initially referring to each position at issue in this case, I use the title listed on the Employer's job description for each position.

supervisors report directly to the director of transportation. The top-level manager over the transportation is the director of transportation.

**Delivery Drivers.** Also referred to as “day drivers,” delivery drivers’ primary duty is to transport product to the Employer’s customers. Delivery drivers also unload the product at customers’ facilities. Delivery drivers begin and end their routes at the same location. Delivery drivers have scattered start times for their shifts: one delivery driver begins at midnight while the others begin at 3, 4, or 5 a.m. All delivery drivers work four 10-hour shifts each week. Delivery drivers frequently work overtime, as the average route time is 11.5 to 12 hours, with any hours over 10 hours in one day being paid at time and a half. The range of hourly wage rates for delivery drivers is \$19 to \$27.83. Delivery drivers report directly to the transportation supervisors.

**Shuttle Drivers.** Shuttle drivers’ primary duty is to tow trailers between the Employer’s yards. All shuttle drivers begin their shifts in Fresno except for one, who begins in Modesto. Shuttle drivers begin and end their routes at the same location. Shuttle drivers tow empty trailers from their starting locations to Modesto.<sup>7</sup> In Modesto, the shuttle drivers detach their empty trailers so that the warehouse employees can fill them. The shuttle drivers then hook up filled trailers to their tractors, and they tow filled trailers to the domicile yards. At the domicile yards, they unhook and leave the filled trailers, and then pick up two more empty trailers to take back to Modesto. Shuttle drivers typically tow two trailers at a time. Shuttle drivers work four 10-hour shifts each week. Shuttle drivers do not regularly work overtime. The range of hourly wage rates for shuttle drivers is \$19 to \$28.20. All shuttle drivers report to a single transportation supervisor.

**Backhaul Driver.** The Employer has one driver dedicated to backhaul duties. “Backhaul” involves drivers picking up product from third parties and taking it to the Employer’s warehouse in Modesto. The backhaul driver works five 8-hour shifts each week. The range of hourly wage rates for the backhaul driver is \$19 to \$27.83. The backhaul driver reports to one of the transportation supervisors based out of Modesto.

**Router.** The router’s main duty is to create and adjust routes driven by delivery drivers. The router also creates the backhaul driver’s routes and assigns additional backhaul pick-ups to delivery and shuttle drivers. The router uses a program called Roadnet in order to create the routes. The program creates the routes based on standard routes that are regularly driven, and it modifies them based on customers’ orders. The router also must manually adjust routes in order to comply with federal and state laws, such as restrictions on drivers’ workhours and weight limits for trailers; and to find cost-saving opportunities for the Employer, such as reductions in mileage and overtime. The router works five 8-hour days per week, Sunday through Thursday. The router may work remotely and has done so throughout the COVID-19 pandemic. The range of hourly wage rates for the router is \$30.63 to \$41.39. The router reports to the director of transportation.

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<sup>7</sup> The record does not disclose to which yard(s) the Modesto shuttle driver travels when shuttling trailers.

**Transportation Clerk.** The transportation clerk performs a number of clerical duties for the transportation department. These duties include payroll for the transportation department to ensure that drivers are paid correctly, which involves compiling drivers' reported information and running a report for the driver incentive pay (DIP) program.<sup>8</sup> The transportation clerk also puts together reports for the Employer's chip incentive program,<sup>9</sup> assembles various reports at the request of management, maintains the driver qualification (DQ) folders, and ensures that those folders are compliant with Department of Transportation guidelines. The transportation clerk also monitors Drive Cam events for possible coaching opportunities. Drive Cam is a system the Employer uses to monitor drivers' performance, automatically recording drivers when the system registers certain actions, such as bumps or quick stops. The range of hourly wage rates for the transportation clerk is \$18.37 to \$24.76. The transportation clerk reports to the director of transportation. The record does not disclose the transportation clerk's regular schedule.

## **B. Warehouse Department**

The warehouse department is concerned with receiving and storing product at the Employer's warehouses in Modesto, as well as assembling delivery orders and loading them into trailers for the drivers.

The top-level manager over the warehouse department is the warehouse director. The warehouse director oversees all warehouse operations while also acting as the direct supervisor for all daytime warehouse employees. The nighttime operations are managed by the outbound warehouse manager, to whom three outbound warehouse supervisors report.

**Inbound Scheduler.** The inbound scheduler's primary duty is to schedule the delivery of product arriving at the Employer's warehouses. The inbound scheduler uses the Sysco Warehouse Management System (SWMS) when scheduling deliveries. While the record shows that the inbound scheduler is an hourly employee, the record does not reflect the wage rate. The inbound scheduler works five 8-hour shifts, 5 a.m. to 1:30 p.m., Monday through Friday. The inbound scheduler reports directly to the warehouse director.

**Inbound Receivers.** Also referred to simply as "receivers," the inbound receivers essentially verify that product coming into the warehouse is consistent with the product the Employer ordered or expected. Receivers largely deal with incoming product from third parties, and they also verify product that comes from backhauls. Receivers do not unload product.<sup>10</sup>

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<sup>8</sup> The record contains some testimony that delivery drivers and the backhaul driver can earn additional pay through the DIP program. However, the record is unclear as to what drivers must do to earn the additional pay.

<sup>9</sup> The chip program is another incentive program. Employees may earn chips based on good performance, safe practices, or other reasons. The Employees can then spend their chips at an online store called "Bobco."

<sup>10</sup> The Employer has a third-party company, Capstone, unload incoming product from trailers.

Receivers work five 8-hour shifts, 5 a.m. to 1:30 p.m., Monday through Friday. The range of hourly wage rates for receivers is \$19.50 to \$25.16. Receivers report directly to the warehouse director.

**Forklift Putaway.** This type of forklift operator moves product that has been unloaded onto the warehouse docks, putting it away in the warehouse. The forklift putaway is also responsible for scanning items while storing them so that the SWMS properly records the location of each item. Forklift putaways work five 8-hour shifts, 6 a.m. to 2:30 p.m., Monday through Friday. Forklift putaways occasionally work overtime as needed. The range of hourly wage rates for forklift putaways is \$19.50 to \$25.86. Forklift putaways report directly to the warehouse director.

**Forklift Let-Down.** Forklift let-downs use forklifts and pallet jacks to ensure that the pick-slots—the locations from which outbound selectors retrieve product—are properly filled from the upper racks, where excess product is stored. Forklift let-downs also scan product as they move it, ensuring that the SWMS correctly reflects whether product is in a pick-slot or stored in the racks. Forklift let-downs work four 10-hour shifts, beginning at either 4 or 5 p.m., on varying days between Sunday and Friday. Forklift let-downs work overtime twice a week on average. The range of hourly wage rates for forklift let-downs is \$19.50 to \$25.86. Forklift let-downs report to the outbound warehouse supervisors.

**Outbound Selector.** Outbound selectors use forklifts and pallet jacks to retrieve product from the warehouses, place product onto pallets, wrap the pallets, and deliver the pallets to the loading docks. Outbound selectors also scan products using a Sysco Order Selection (SOS) device so that the Employer's SWMS correctly tracks the location of product. Outbound selectors work four 10-hour shifts, beginning at either 5 a.m. or 5 p.m., on varying days between Sunday and Friday. Outbound selectors work overtime about two times per week on average. The range of hourly wage rates for outbound selectors is \$19.50 to \$25.86. Outbound selectors report to the outbound warehouse supervisors.

**Loader.** Loaders are tasked with loading trailers to be picked up by drivers. Loaders also arrange product on pallets and wrap the pallets before placing them in trailers, just as outbound selectors do. Loaders also use SOS devices to scan product. The SOS devices also assist loaders in the proper arrangement of product inside the trailers, and the devices update the Employer's SWMS. Loaders work four 10-hour shifts, from 5:30 p.m. to 4 a.m. Like the other warehouse employees, loaders also work overtime approximately twice per week. The range of hourly wage rates for loaders is \$19.50 to \$25.86. Loaders report to the outbound warehouse supervisors.

### **C. Inventory Control/Quality Assurance Department**

The IC/QA department falls under the Employer's finance division, which is separate from the other departments at issue in this case. The supervisor over all the employees in this department is the inventory control supervisor. The inventory control supervisor, in turn, reports to a compliance manager rather than reporting to the vice president of operations, as do the other department heads. All employees in this department work five 8-hour days per week, Monday through Friday. All IC/QA employees are located in Modesto.

**Quality Assurance Produce Inspector.** The quality assurance produce inspector inspects incoming perishable product to ensure that it meets the Employer's standards. For example, the inspector looks for rotten produce, which would cause the Employer to reject the product. The inspector also checks expiration dates on perishable items; if the items are set to expire in a short amount of time, the inspector may reject them. The inspector completes these tasks when perishable items are delivered to the warehouse. After approving any items, the inspector informs the inbound receiver that product may be received into the warehouse. The quality assurance produce inspector works from 6 a.m. to 2:30 p.m. The range of hourly wage rates for the quality assurance produce inspector is \$18.37 to \$24.76.

**Cycle Counter.** Also called "inventory control," cycle counters perform counts of all materials, equipment, merchandise, and supplies in the Employer's facilities, keeping records of the quantity, type, and value of these items. Essentially, cycle counters ensure that product is in the appropriate location and in the correct amount according to the SWMS. Cycle counters work to resolve any discrepancies between the SWMS and the product in the Employer's facilities, whether the discrepancies arise from their own counts or from reports from drivers concerning missing or extra product in their trailers. Cycle counters work from 6 a.m. to 2:30 p.m. The range of hourly wage rates for cycle counters is \$18.37 to \$24.76.

**Driver Check-In Associate.** The driver check-in associates meet delivery drivers at the warehouse after the drivers have completed a post-trip inspection of their tractor-trailer. The driver check-in associates take the invoices from the drivers' deliveries. When drivers return with product, whether extra, backhaul, or a return, driver check-in associates process the product. To process the product, driver check-in associates enter the product into the SWMS, print a label to put onto the product, and physically place the product in the warehouse according to the SWMS's direction. The driver check-in associate works from 10 a.m. to 6:30 p.m. The range of hourly wage rates for the driver check-in associate is \$18.37 to \$24.76.

**Will-Call Associate.** The will-call associate works at the Employer's will-call desk, from which the associate handles will-call orders. Will-call orders are customer orders of less than 50 cases of product that the customer chooses to pick up rather than have delivered. The Employer's customer service department informs the will-call associate of orders, and the will-call selector<sup>11</sup> stages the product for pick-up. When a customer arrives at the warehouse to pick up a will-call order, the will-call associate processes the paperwork for the order with the customer. The will-call associate works from 8:30 a.m. to 5:30 p.m. The range of hourly wage rates for the will-call associate is \$15.05 to \$20.80.

#### **D. Maintenance Department**

The maintenance department's function is to maintain the Employer's vehicles, buildings, and equipment. Because the maintenance department is currently without a fleet, facilities, and maintenance supervisor, the vice president of operations is acting as the head of the department. The entirety of the Employer's maintenance department is located in Modesto.

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<sup>11</sup> The will-call selector is an employee of the warehouse department.

**Fleet Technician III.**<sup>12</sup> Fleet technicians are mechanics who work on and upkeep the tractor-trailers. The technicians do the preventative maintenance on tractor-trailers at regular intervals, and they also carry out repairs whenever necessary. On Wednesdays, the Employer sends one fleet technician to Fresno to do preventative maintenance as needed. When tractor-trailers have problems while away from any of the Employer's facilities, a fleet technician may take the department's service truck and attempt to resolve the problem out in the field. However, depending on how far the tractor-trailer is from Modesto and the complexity of the issue, the Employer may use third parties for towing and repairs. The Employer also sometimes uses third parties for repairs on tractor-trailers if the fleet technicians are unable to resolve the problem. The Employer has four technicians. The two fleet master techs begin work between 5 and 6 a.m., working 8 to 10 hours per day. The other two technicians begin work at 3 or 4 p.m. and work until 10 or 11 p.m. The range of hourly wage rates for fleet technicians is \$30.63 to \$41.39.

**MHE Technician I.**<sup>13</sup> MHE stands for "material handling equipment," and the Employer currently employs only one of these technicians.<sup>14</sup> This technician essentially does inspections, preventative maintenance, and repairs for all the Employer's equipment (for example, pallet jacks and forklifts) and facilities (for example, maintain the racks on which product is stored and changing lights). The MHE technician works 6 a.m. to 2:30 p.m. The range of hourly wage rates for this technician is \$20 to \$25.

**Maintenance Coordinator.** The maintenance coordinator's principal duty is to track all of the preventative maintenance performed. The Employer uses a program called Sprocket that automatically informs the Employer when preventative maintenance is needed on any equipment. Once the maintenance department completes that preventative maintenance, the coordinator marks it as completed in Sprocket. The coordinator deals with invoices for parts or third-party services used by the maintenance department. The coordinator also handles the department's mail and prepares routine reports concerning the department. The maintenance coordinator typically works from 8:30 a.m. to 5 p.m. The range of hourly wage rates for the coordinator is \$16.63 to \$22.40.

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<sup>12</sup> The record contains no reference to any position titled "fleet technician I" or "fleet technician II." The vice president of operations testified that two of the four fleet technicians are "fleet techs" and two are "fleet master techs." Other than the difference in workhours, the record does not reflect any difference between fleet techs and fleet master techs.

<sup>13</sup> The record contains a job description for an MHE technician III; however, the vice president of operations testified that the Employer currently has no MHE technician III.

<sup>14</sup> The Employer also has an individual from a third party doing the work of an MHE technician during some nights.

## II. UNIT SCOPE

The Petitioner contends that delivery drivers and the backhaul driver at the Employer's Modesto, Sacramento, and Merced facilities constitute a single-terminal unit that is presumptively appropriate under Board law. The Employer asserts that the petitioned-for unit is not a single-terminal unit while also arguing that the smallest appropriate unit is a wall-to-wall, or systemwide, unit of the Modesto, Sacramento, Merced, Fresno, and Tulare facilities. As set forth below, I find that the petitioned-for unit is not a single-terminal facility and, thus, is not entitled to a presumption of appropriateness. Applying the test for a multi-facility unit, however, I find that the petitioned-for drivers at the Modesto, Sacramento, and Merced facilities constitute an appropriate unit for collective bargaining.

### A. Board Law Regarding Unit Scope

A single-facility unit is presumptively appropriate unless it has been so effectively merged or is so functionally integrated that it has lost its separate identity. *D&L Transportation, Inc.*, 324 NLRB 160, 160 (1997). Single-terminal units are also presumptively appropriate. *Groendyke Transport, Inc.*, 171 NLRB 997, 998 and cited cases (1968). The party opposing a single-facility unit bears the burden of rebutting the unit's presumptive appropriateness. *J&L Plate, Inc.*, 310 NLRB 429, 429 (1993); *Renzetti's Market, Inc.*, 238 NLRB 174, 175 (1978). To determine whether the single-facility presumption has been rebutted, the Board examines several factors including: (1) central control over daily operations and labor relations, including the extent of local autonomy; (2) similarity of employee skills, functions, and working conditions; (3) the degree of employee interchange; (4) the distance between locations; and (5) bargaining history, if any exists. See, e.g., *Trane*, 339 NLRB 866, 867 (2003); *D&L Transportation*, 324 NLRB at 160; *J & L Plate, Inc.*, 310 NLRB at 429.

However, a single-facility presumption does not apply when a petitioner seeks a multifacility unit. When the petitioned-for unit includes multiple facilities, the Board applies a variant of the community-of-interest test, which weighs the following factors to determine the appropriateness of the unit: employees' skills, duties, and working conditions; functional integration of business operations, including employee interchange; geographic proximity; centralized control of management and supervision; bargaining history; and extent of union organizing and employee choice. 370 NLRB No. 39, slip op. at 2 (2020) (quoting *Laboratory Corp. of America Holdings*, 341 NLRB 1079, 1081-1082 (2004)). The Board will find a petitioned-for multifacility unit inappropriate if the petitioned-for group does not share a community of interest distinct from that shared with employees at other, excluded locations. *Laboratory Corp. of America Holdings*, above at 1082 (2004); see also *Acme Markets, Inc.*, 328 NLRB 1208 (1999). It is well settled that a petitioned-for unit need only be *an* appropriate unit; it need not be the *most* appropriate unit. See *PCC Structural, Inc.*, 365 NLRB No. 160, slip op. at 12 (2017).

### B. The Petitioned-for Unit Is Not Entitled to a Presumption of Appropriateness

First, I must consider the Petitioner's assertion that the petitioned-for unit constitutes a single facility. The Petitioner asserts that the Employer's facilities in Modesto, Sacramento, and Merced constitute a single terminal. The Employer argues that the Petitioner has sought a multi-

facility unit. For the reasons detailed below, I find that the Employer's facilities in Modesto, Sacramento, and Merced do not constitute a single facility. Accordingly, a presumption of appropriateness does not apply.

The Petitioner relies heavily on *Wayland Distributing Co.*, 204 NLRB 459 (1973), in arguing that the Modesto, Sacramento, and Merced facilities constitute a single terminal. In that case, the Board, found that a unit of truckdrivers and shop and maintenance employees out of Mobile, Alabama, and Pensacola, Florida, was an appropriate unit. The petitioned-for unit included eight drivers in Mobile and one driver in Pensacola. The employer argued that the only appropriate unit included all drivers and shop and maintenance employees in 13 additional cities throughout a total of 7 states. The Board found that that the Mobile drivers and the single Pensacola driver constituted an appropriate unit based on the lack of interchange between the employer's facilities, the lack of bargaining history, and the common supervision between the drivers.

I find that *Wayland Distributing* is inapposite to the present matter. The Board in that case did not find that the Mobile terminal and the single Pensacola employee were, together, a single-terminal unit. Instead, the Board found that "the [Mobile] single-terminal unit, *with the addition of the Pensacola driver...* [was] appropriate." *Id.* at 459 (emphasis added). There, the Board made no mention of a satellite facility or domicile yard in Pensacola, as is the issue in the present case. Indeed, the *Wayland Distributing* Board made only an indirect reference to a single-facility presumption with a footnote after the words "single-terminal unit." That footnote cited to *Groendyke Transport, Inc.*, 171 NLRB 997 (1968), in which the Board had previously extended the single-facility presumption to a single terminal; however, *Groendyke Transport* did not involve satellite facilities or domicile yards.<sup>15</sup>

In reviewing Board precedent, the Board has laid out no specific guidelines in determining whether a principal location and satellite locations constitute a single-facility entity for the purpose of applying a presumption of appropriateness. In *Child's Hospital*, 307 NLRB 90, 91-92 (1992), the board found that three operations—a nursing home, hospital, and office—were a single facility based, in part, on the three operations forming one contiguous structure. In *Publix Super Markets*, 343 NLRB 1023, 1027 (2004), the Board noted that the Regional Director had inappropriately applied a single-facility presumption where the Regional Director found several classifications of employees working out of one building along with one additional classification of employees working out of a satellite building approximately 100 feet away were an appropriate single-facility unit.

In the present case, none of the domicile yards are contiguous with the Employer's yard and other operations in Modesto. The Merced domicile yard is approximately 40 miles away from Modesto, and the Sacramento domicile yard is 75 miles away from Modesto.<sup>16</sup> Both domicile yards

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<sup>15</sup> I also note that the Board's placement of the footnote citing to *Groendyke Transport* after "the single-terminal unit," rather than after "with the addition of the Pensacola driver," suggests that the Board only intended to apply the single-facility presumption to the Mobile terminal.

<sup>16</sup> I take administrative notice of the shortest driving distance between various cities in this case using Google Maps. See *Bud Antle, Inc.*, 361 NLRB 873 (2014), incorporating by reference *Bud*

consist of physical locations where drivers begin and end their routes, and each has a shed where employees may store their equipment. Based on these facts, I find that the Modesto, Sacramento, and Merced locations do not constitute a single facility. Consequently, I will apply the multifacility community-of-interest test in determining the appropriate unit scope.

### **C. Facts Relevant to the Appropriateness of the Petitioned-for Multifacility Unit**

Below, I review facts related to the community-of-interest factors under the Board's multifacility-unit analysis.

#### **1. Employees' Skills, Duties, and Working Conditions**

As summarized in the above section on the Employer's operations, delivery drivers' main duty is to deliver product to customers. The record shows that, regardless of where delivery drivers work, their duties and working conditions are the same. Delivery drivers and the backhaul driver are all paid according to the same range of hourly wage rates. All delivery drivers are all eligible to receive additional pay under a driver incentive pay (DIP) program.<sup>17</sup>

All delivery drivers possess the same skills, as they all must possess a commercial driver's license (CDL) and comply with state and federal driver-specific regulations. They are subject to mandatory physical examinations. It is also notable that the Employer has the same job description—which details the skills, duties, and competencies required of candidates for this position—for all delivery drivers.

The single backhaul driver is based out of Modesto, beginning and ending each workday there. While the delivery drivers spend the vast majority of their workdays making deliveries to customers, the backhaul driver picks up product from third-party providers to take back to the Employer's warehouse in Modesto.

The backhaul driver possess the same skills as delivery drivers, including possession of a CDL, and must comply with the same state and federal regulations. Unlike all delivery drivers, who work four 10-hour shifts each week, the backhaul drivers works five 8-hour shifts.

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*Antle, Inc.*, 359 NLRB 1257 (2013), and specifically footnote 3 of 359 NLRB at 1257, where the Board takes administrative notice of approximate distances based on Google Maps.

<sup>17</sup> The record is unclear as to whether the backhaul driver is eligible for the DIP program. Nowhere in the record is it explicitly stated that the backhaul driver is eligible. The transportation director testified that the "day drivers" are all under the same range of wage rates and are eligible for the DIP program, while shuttle drivers are under a different range of wage rates and are not eligible for the DIP Program. The record reflects that the backhaul driver works five 8-hour shifts per week and interacts with receivers on a daily basis. As receivers all work from 5 a.m. to 1:30 p.m., it is likely that the backhaul driver also works daylight hours and may be considered a "day driver." However, the backhaul driver is not referred to as a "day driver" anywhere in the record.

The record also shows that delivery drivers perform backhauls. Although the Employer has a dedicated backhaul driver, one of the Employer's transportation supervisors testified that multiple delivery drivers perform backhauls every day. The Employer assign backhauls to delivery drivers depending on the where a backhaul request originates (i.e., where the vendor is located) and the delivery routes. The record contains only one specific example of overlapping duties between a delivery driver and the backhaul driver. In this one example, a Fresno-based delivery driver performed a backhaul in the Merced area.<sup>18</sup>

Additionally, the Employer sometimes has delivery drivers perform the duties of shuttle drivers; however, the record is unclear as to the frequency with which delivery drivers shuttle trailers between yards. One transportation supervisor testified that delivery drivers shuttle trailers "based on business" or if the Employer is "shorthanded." The record contains one specific example of a Fresno-based driver shuttling a trailer from the Merced area to Fresno.<sup>19</sup>

## **2. Functional Integration of Business Operations, Including Employee Interchange**

Speaking only to the functional integration of the petitioned-for drivers and the excluded delivery drivers, the records shows that the Employer distinguishes between these two groups for operational purposes. The Employer groups the delivery drivers in Modesto, Sacramento, and Merced together, as well the backhaul driver, as the "North Drivers." The Employer groups the delivery drivers in Fresno and Tulare together as the "South Drivers." The Employer has 42 delivery drivers on its list of North Drivers and 33 delivery drivers on its list of South Drivers. The Employer maintains separate seniority lists for each of these groups. The seniority lists impact how the drivers bid on routes, bid on vacations, and receive overtime assignments. Thus, when the Employer conducts its annual bid for routes, it provides the North Drivers with a list of routes that start and end in Modesto, Sacramento, and Merced, and the Employer provides to the South Drivers a separate list of routes that start and end in Fresno and Tulare.<sup>20</sup> The Employer conducts its annual vacation bid in a similar manner: the Employer maintains separate calendars for the

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<sup>18</sup> See Emp. Exh. 51.

<sup>19</sup> See Emp. Exh. 52. I mention this one example of a delivery driver performing a shuttle run—a typical duty of shuttle drivers, whom I am not considering in this multifacility analysis—only to call attention to a separate duty that delivery drivers may perform in the course of the normal deliveries.

<sup>20</sup> One of the Employer's transportation supervisors testified that a delivery driver from one list could bid on a route from another list. However, another of the Employer's transportation supervisors and the transportation director both testified that South and North drivers receive separate lists during the annual bids for routes. The Employer's vice president of operations testified that, were a driver to move homes from a North Driver area to a South Driver area, or vice-versa, the Employer would allow that driver to bid based on the driver's new home address, and that the Employer would "work through... a situation like that."

North Drivers and the South Drivers, and the drivers bid on weeks of vacation based on seniority within their groups.

For overtime, the drivers must sign up on an overtime list to indicate that they are willing to accept overtime assignments. The Employer keeps a separate overtime list for the North Drivers and a separate overtime list for the South Drivers. One of the Employer's transportation supervisors and the transportation director testified that if no drivers are signed up for overtime, the Employer uses reverse seniority to force the least senior driver to work. The transportation director testified that the average of overtime across delivery drivers was 15 percent on a weekly basis.

The record appears to also support finding that the separation between North Drivers and South Drivers has some effect on how the Employers conducts furloughs and layoffs. The transportation director testified that the Employer's most recent furloughs/layoffs of delivery drivers occurred in March/April 2020. Although the transportation director did not explicitly describe the process by which the Employer performed the furloughs/layoffs, the director testified that the Employer had furloughed or laid off eight individuals from the North Drivers list and five individuals from the South Drivers list. Based on hiring dates, two of the furloughed or laid-off South Drivers had greater seniority than nine individuals on the North Drivers list who were not laid off, and a third furloughed or laid-off South Driver had greater seniority than eight of those same individuals on the North Drivers list. This suggests that, operationally, the Employer only considers seniority within each group when furloughing or laying off delivery drivers.<sup>21</sup> Additionally, when the Employer eliminated two routes from Merced, the Employer assigned the drivers who were on those routes to open routes in Modesto.<sup>22</sup>

The record contains only one specific instance of temporary interchange between the petitioned-for delivery drivers and the excluded delivery drivers.<sup>23</sup> At hearing, the Employer's

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<sup>21</sup> I note that the record is not definitive on the Employer's furlough/layoff process. As noted, the transportation director did not explicitly testify as to how the Employer treats seniority with respect to furloughs and layoffs. Thus, the record does not reflect, for example, if the Employer permitted or would permit a more-senior South Driver to bump into the list of North Drivers; however, the record does not contain any documentary evidence that any bumping has ever occurred.

<sup>22</sup> On brief, the Petitioner mistakenly states that the two drivers who were assigned to the eliminated Merced routes used their seniority to bid on routes that began in Modesto. However, when asked if it was true that those drivers had bid into Modesto routes, the transportation director testified, "No... we actually brought those two guys back to Modesto, and they filled in on open Modesto routes at that time."

<sup>23</sup> The Employer asserts that Emp. Exhs. 51 and 52 also show examples of temporary interchange between North and South Drivers. However, as the Employer's vice president of operations testified, Emp. Exhs. 51 and 52 each show a Fresno-based (South) driver beginning a route in Fresno, making stops in the Merced area, and returning to Fresno, on March 2 and 3, 2021, which were the first and second day of the hearing in this matter.

transportation director testified that Employer Exhibit 53 showed a driver based out of Fresno (a South Driver) driving a route typically done by a driver based out of Merced (a North Driver). The exhibit appears to show that the Fresno-based driver covered the route on March 4, 2021, which was on the third day of the four-day hearing in this matter, and the Merced-based driver covered the route on January 14, 2021. The record also contains conclusory statements from the Employer's vice president of operations and transportation director that a driver from one group covers a route typically driven by the other group two to five times a week. However, no records to substantiate this claim were submitted by the Employer.

The Petitioner presented a witness, a former delivery driver out of Modesto, who testified regarding interchange. The former driver testified that, in seven years of working for the Employer, the driver was never assigned to drive a route out of the Fresno yard. The same witness testified to only ever seeing Fresno drivers in Modesto and running routes out of Modesto on two occasions explaining that, at the time, the Employer was short on drivers.

### **3. Geographic Proximity**

As mentioned in the above section on the Employer's operations, the Employer's warehouse and main offices are located in Modesto. Each of the domicile yards are located at the following distances and directions away from Modesto:

- Sacramento, 75 miles north,
- Merced, 40 miles southeast,
- Fresno, 95 miles southeast, and
- Tulare, 167 miles southeast.

### **4. Centralized Control of Management and Supervision**

The transportation director is the top-level manager over the transportation department. Four transportation supervisors directly supervise all delivery drivers, the backhaul driver, and all shuttle drivers. Two of the supervisors are located in Fresno, and two of them are located in Modesto. In each of those locations, one of the supervisors is the a.m. supervisor and the other is the p.m. supervisor. The a.m. supervisors are responsible for ensuring that delivery drivers leave on time, while the p.m. supervisors are responsible for ensuring that the drivers return from their routes. All supervisors respond to questions or issues that drivers may raise to them. The backhaul driver is supervised by one of the Modesto supervisors. One of the Fresno supervisors supervises all delivery drivers on Saturdays, during which the Employer runs approximately 10 routes, which is equivalent to about eight percent of the volume of business the Employer does on a weekly basis. The Saturday routes originate in both Modesto and Fresno, but the record does not specify how many routes originate from each location.

The transportation director testified that, generally, the supervisors located in Modesto handle any issues or problems with the Modesto drivers, and the supervisors located in Fresno handle any issues or problems with the Fresno drivers. However, drivers are aware that they may contact any supervisor in the event that they are unable to reach the supervisor to whom they typically report.

The Employer's witnesses testified that supervisors may give the first two levels of discipline to drivers: coaching and retraining for at the first level, and written warnings at the second level. The transportation director testified that the supervisors are responsible for ensuring that written warnings are placed in employees' personnel files. Regarding suspensions, the vice president of operations testified that supervisors have the authority to suspend drivers; however, one of the transportation supervisors testified to not having such authority. At the very least, supervisors are consulted with respect to suspensions and discharges. All suspensions and discharges involve the Employer's human resources department.

The parties stipulated that the Employer's human resources department is involved in and has responsibility for policies and procedures, interviewing, hiring, coaching, and addressing employees' issues, including performance, discipline, termination of employment, compensation, benefits, investigations, and raises.

The Employer's management has a number of meetings, most of which occur weekly. An operations meeting occurs on Thursdays, which includes the vice president of operations, the warehouse director, the night warehouse manager, the human resources manager, the chief financial officer (CFO), and one of the Fresno transportation supervisors. The meeting involves a review of performance metrics and the results of the positive associate relationship (PAR) meetings.

The Employer also conducts a shrink meeting on Thursdays. Shrink refers to anything that negatively affects the Employer's bottom line. This meeting includes the IC/QA, warehouse, and transportation departments.

Another weekly meeting for the Employer is the incident review committee (IRC). The meeting typically involves all four transportation supervisors, the transportation director, and the vice president of operations. Other managers or supervisors may also join the meeting. At these meetings, management and supervisors review incidents or accidents, including those that occur on drivers' Drive Cam events, and then they discuss ways to troubleshoot issues or prevent other incidents.

The Employer conducts a routing optimization meeting on Mondays. The meeting includes the transportation director, the router, a regional sales manager, an individual from the Employer's Hispanic market, and an individual in charge of the Employer's multi-unit department. The meeting essentially concerns metrics and efficiencies for the drivers' routes.

The Employer's organizational chart shows that a specific number of delivery drivers report directly to each of the four supervisors: one Modesto supervisor has 22 drivers, and the other Modesto driver has 20 drivers (as well as the backhaul driver); one Fresno supervisor has 18 drivers, and the other Fresno supervisor has 16 drivers. One of the supervisors testified to several reasons that the drivers were grouped underneath each supervisor: the supervisors signs off on the

drivers' trainings,<sup>24</sup> supervisors may receive incentives based on their team, and the teams are related to safety promotions.<sup>25</sup>

## **5. Bargaining History**

There is no bargaining history between the parties in this matter.

### **D. The Petitioned-For Multifacility Unit is Appropriate for a Unit of Delivery Drivers**

In weighing the above factors, I find that the petitioned-for unit has a community of interest sufficiently distinct from the same classification of employees of the excluded facilities.

Of the five community-of-interest factors, the functional integration of business operations within the petitioned-for unit is the factor that most heavily weighs in favor of finding the petitioned-for unit appropriate. The Employer has created a clear division between the North Drivers (in Modesto, Sacramento, and Merced) and the South Drivers (in Fresno and Tulare), treating them separately for the purposes of bidding on routes, bidding on vacations, and layoffs/furloughs. The Employer argues that there is substantial interchange between the North and South Drivers: the vice president of operations and the transportation director testified that routes are moved, or starting locations are moved, or that interchange between North and South Drivers occurs weekly, two times each week, or two to five times a week, alternatively. The Employer's sole illustrative example of interchange, however, is less than persuasive on closer examination. The Employer's transportation director testified that Employer Exhibit 53 showed that a South driver covered a route in March that a North driver had covered in January. However, on cross examination, the transportation director noted that the South driver still began and ended the route in Fresno, and the North driver began and ended the route in Modesto. This suggests that the Employer modifies the routes to conform to the drivers rather than having drivers interchange to cover the work of one another by reporting to Modesto instead of Fresno or vice versa and temporarily transferring to a different facility. <sup>[1]</sup> Put another way, this example of interchange

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<sup>24</sup> This transportation supervisor testified that the supervisors have to "sign off on stuff whether it be training or whatever." The supervisor provided no further testimony as to other documents supervisors sign off on aside from training.

<sup>25</sup> The record contains no additional testimony or evidence as to how supervisors receive incentives based on their teams, nor does the record contain additional testimony or evidence concerning safety promotions.

<sup>[1]</sup> Additionally, closer examination of the exhibit shows several inconsistencies between the routes that the Employer represents as being a "Merced route." The first page of Emp. Exh. 53 shows the South driver covering a route with the description "Route 69(4033), KING CITY." However, the third page of the exhibit, showing the North driver covering the supposedly same route, shows a description of "Route 66(4039), SALINAS." Although some of the addresses listed between the two routes are the same, other addresses are different: while both drivers went to Salinas and King City, the South driver also went to Soledad and Greenfield, whereas the North driver went to

does not show that South Drivers cover the same routes that North Drivers perform. Furthermore, the former driver's testimony also weakens the Employer's assertion that interchange occurs with a weekly to five times a week frequency. Furthermore, if interchange indeed occurs with drivers having to start and end their routes out of a location other than where they typically do, the record does not include evidence that any such interchange is required.

The Board has found that interchange was established and significant where, during a one-year period, there were approximately 400 to 425 temporary employee transfers among three terminals in a workforce of 87, and the transferees were directly supervised by the terminal manager at the terminal where the work was being performed. *Dayton Transport Corp.* 270 NLRB 1114 (1984). Where the amount of interchange is unclear, both as to scope and frequency because it is unclear how the total amount of interchange compares to the total amount of work performed, the burden of proof is not met, including where a party fails to support a claim of interchange with either documentation or specific testimony providing context. *Cargill, Inc.*, 336 NLRB 1114 (2001); *Courier Dispatch Group*, 311 NLRB 728, 731 (1993). Also important in considering interchange is whether the temporary employee transfers are voluntary or required, the number of permanent employee transfers, and whether the permanent employee transfers are voluntary. *New Britain Transportation Co.*, 330 NLRB 397, 398 (1999). Based on the record in this case, and in light of Board law, I find that the record evidence concerning interchange between North and South Drivers does not mandate the expansion of the unit to include additional drivers.

I find that the geographic proximity of the domicile yards compared to Modesto also favors the petitioned-for unit, as the Sacramento and Merced domicile yards are demonstrably closer to Modesto than the yards in Fresno and Tulare.

The centralized control of management and supervision weighs either slightly in favor of the petitioned-for unit or is otherwise neutral. The record shows that day-to-day supervision of delivery drivers is largely split between North Drivers and South Drivers. Saturdays are an exception, but the amount of work performed by delivery drivers is a small portion of the overall amount of work performed by delivery drivers throughout the week. Tilting this factor toward the larger unit's favor are the facts that higher management functions are centralized, and any discipline above a written warning is also centralized. Additionally, management conducts many meetings that affect both sets of drivers. Thus, while day-to-day decisions are locally handled, more severe disciplinary matters are centralized.

As there is no bargaining history to consider in this case, this factor is neutral.

The only factor that wholly favors an expanded drivers' unit is the drivers' skills, duties, and working conditions. Neither party argues that the North and South Drivers differ on this factor, and the record supports that there is little difference between the two.

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Chualar. I recognize, of course, that the record shows that routes may be adjusted based on customer needs.

On brief, the Employer argues that the petitioned-for unit is “fractured.” The Employer largely relies on the Board’s decision in *Bergdorf Goodman*, 361 NLRB 50 (2014), in support of this argument. In that case, the Board found that a petitioned-for unit of women’s shoe sale associates across two of the employer’s departments was inappropriate. The Board recognized that the unit had some internal community of interest and was readily identifiable as employees who sold women’s shoes; however, the Board found other community-of-interest factors outweighed those that were shared and the unit did not track any administrative or operational boundaries drawn by the Employer. Here, the Employer argues that the Petitioner’s proposed unit is not readily identifiable and lacks any relationship to the administrative or operational lines drawn by the Employer. I disagree. In the present case, the Petitioner seeks to represent all North Drivers, which is the Employer’s own administrative and operational grouping for the delivery drivers and the backhaul driver out of Modesto, Sacramento, and Merced. As explained above, the Employer administers the North and South Drivers separately with respect to frontline supervisors and bid processes for routes and vacations. The Employer also assigns overtime separately for these groups. For these reasons, I find that the petitioned-for unit falls within the Employer’s own administrative and operational lines.

Based on the balancing of the community-of-interest factors for a multifacility unit, as detailed above, I find that the petitioned-for multifacility unit is an appropriate unit for the purposes of collective bargaining. Here, the petitioned-for delivery drivers share a community of interest that is distinct from those shared with the delivery drivers at the excluded locations.

### III. UNIT COMPOSITION

Having determined that the petitioned-for multifacility unit is appropriate, I now turn to the appropriateness of the unit composition. The Petitioner seeks to represent a unit of delivery drivers working out of Modesto, Sacramento, and Merced, as well as the single backhaul driver working out of Modesto. The Employer asserts that the unit must also include shuttle drivers,<sup>26</sup> the router,<sup>27</sup> the transportation clerk,<sup>28</sup> the inbound scheduler, inbound receivers, forklift putaways,

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<sup>26</sup> Of the Employer’s 11 shuttle drivers, only 1 shuttle driver is based out of Modesto, while the remaining 10 shuttle drivers are based out of Fresno. Although I have already determined that the scope of the petitioned-for unit, excludes the Fresno facility, I nevertheless consider the shuttle drivers in this section concerning unit composition.

<sup>27</sup> The Petitioner asserts that the router should be excluded because the petitioned-for unit has distinct interests from the router. Alternatively, the Petitioner argues that the router is a supervisor, as defined in Section 2(11) of the Act, and must be excluded. As explained in this decision, I have found the router is appropriately excluded based on the distinct community-of-interest factors between it and the petitioned-for employees. For this reason, I do not reach the Petitioner’s alternative argument.

<sup>28</sup> The Petitioner asserts that the transportation clerk should be excluded because the petitioned-for unit has distinct interests from the transportation clerk. Alternatively, the Petitioner argues that the transportation clerk is a confidential employee and, as a matter of Board policy, must be excluded. As explained in this decision, I have found the transportation clerk is appropriately

forklift let-downs, outbound selectors, loaders, quality assurance produce inspectors, cycle counters, driver check-in associates, the will-call associate, fleet technician IIIs, the MHE technician I, and the maintenance coordinator. Applying the traditional community-of-interest test, I find that the petitioned-for unit shares a community of interest that is sufficiently distinct from the excluded employees.

**A. Board Law Regarding Unit Composition**

In *PCC Structural*s, 365 NLRB No. 160 (2017), the Board reinstated its traditional community-of-interest test for determining appropriate unit composition. Under this test, the Board is required in each case to determine the following:

Whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

*Id.*, slip op. at 5. Subsequently, in *Boeing*, the Board provided further guidance on the analysis for determining bargaining unit composition, stating that any such inquiry required a three-step process: (1) the proposed unit must share an internal community of interest; (2) the interests of employees within the proposed unit and the shared and distinct interests of employees excluded from that unit must be comparatively analyzed and weighed; and (3) consideration must be given to the Board's decisions on appropriate units in the particular industry involved. 368 NLRB No. 67, slip op. at 3. Specific to the second step of this analysis, the *Boeing* Board agreed with the Second Circuit's opinion in *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 794-795 (2d Cir. 2016), with respect to the weighing of the community-of-interest factors:

Merely recording similarities or differences between employees does not substitute for an explanation of how and why these collective-bargaining interests are relevant and support the conclusion. Explaining why the excluded employees have distinct interests in the context of collective bargaining is necessary to avoid arbitrary lines of demarcation.

**B. *Boeing* Step One: Internal Community of Interest of the Petitioned-For Unit**

Under the first step of *Boeing*, I consider whether the petitioner-for unit shares an internal community of interest. As largely reviewed in the above section on the appropriateness of the multifacility unit in this case, the delivery drivers and the backhaul driver have an internal

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excluded based on the distinct community-of-interest factors between it and the petitioned-for employees. For this reason, I do not reach the Petitioner's alternative argument.

community interest. Additionally, neither party contends that the petitioned-for unit does not share an internal community of interest.<sup>29</sup> In any event, I summarize this shared interest below.

Petitioned-for classifications belong to the same transportation department, and they also constitute the entirety of the Employer's grouping of North Drivers. The petitioned-for drivers all share the same skills, including the requirement of having a CDL. The record reflects that the petitioned-for drivers participate in the same trainings, which include food and operational safety trainings that are general to all employees and additional training that is specific to drivers. The record shows that these drivers also have the same terms and conditions of employment, including the same hourly wage rates, benefits, uniforms, personnel policies, and employee handbook. The petitioned-for employees share the same two supervisors, both of whom are physically located in Modesto.

While the above factors are all the same for the petitioned-for delivery drivers and the backhaul driver, most of the remaining factors show some slight differences in interests between the two classifications. Regarding distinct job functions and job overlap, and as explained above, the delivery drivers deliver product to customers, whereas the backhaul driver picks up product from third-party providers and returns it to the warehouse in Modesto; as such, these two classifications perform distinct functions. Although the record contains testimony that the delivery drivers perform backhauls, the Employer did not support the testimony regarding the frequency of this overlap with documentary records.<sup>30</sup>

The record also lacks any specific evidence relating to interchange between delivery drivers and the backhaul driver. The record contains some testimony that delivery drivers in Modesto often meet at the beginning of their shifts, prior to leaving the warehouse, but the record has no evidence pertaining to contact between the delivery drivers and the backhaul driver. Lacking any evidence on these factors, I find that these factors weigh at least slightly against an internal community of interests.

Functional integration, also does not appear to weigh in favor of an internal community of interest. I note that, in the previous section regarding the appropriateness of the petitioned-for multifacility unit—a matter of unit scope—I considered how the petitioned-for unit was functionally integrated into the Employer's business operations as a single and cohesive unit, the North Drivers. Here, in considering unit composition, I consider whether the job functions of

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<sup>29</sup> On brief, the Petitioner explicitly states that the petitioned-for unit shares an internal community of interest. Although the Employer does not state that the petitioned-for unit shares an internal community of interest, the Employer argues that a wall-to-wall unit of all the Employer's facilities, and that all the included and excluded employees have a shared community of interest; as a result, the Employer's argument implies an internal community of interest among the petitioned-for unit.

<sup>30</sup> One of the Modesto transportation supervisors testified that multiple delivery drivers perform backhauls every day. However, the documents submitted by the Employer contain only one specific example of this (Er. Exh. 51), and the example is of a Fresno delivery driver picking up backhauls in the Merced area.

delivery drivers are integrated with those of the backhaul driver. Neither classification relies on the other in order to perform its duties. Consequently, this factor does not weigh in favor of a shared interest.

Having considered the above factors, I find that the majority of them weigh in favor of a shared internal community of interest.

**C. *Boeing* Step Two: Shared and Distinct Interests of the Petitioned-for Unit and the Excluded Employees**

Below, I review the record evidence related to each community-of-interest factor for the petitioned-for unit and the excluded employees. I also review additional Board law relevant to each factor as necessary. After reviewing the facts related to a factor, I conclude whether the factor supports finding that the petitioned-for unit has a shared community of interest sufficiently distinct from the excluded employees. After reviewing each factor, I discuss my finding at this step under *Boeing*.

**1. Departmental Separation**

The petitioned-for unit of delivery drivers and the backhaul driver are in the transportation department. Shuttle drivers, the router, and the transportation clerk are also in the transportation department. However, only the petitioned-for employees form the Employer's group of North Drivers.

The inbound scheduler, inbound receivers, forklift putaways, forklift let-downs, the outbound selector, and loaders are in the warehouse department.

The quality assurance produce inspector, cycle counters, the driver check-in associate, and the will-call associate are in the inventory control/quality assurance (IC/QA) department.

The fleet technician IIIs, MHE technician Is, and the maintenance coordinator are in the maintenance department.

Based on the above, I conclude that differences in departmental organization between the petitioned-for and excluded employees weigh in favor of finding that the petitioned-for unit has a distinct shared community of interests from the excluded employees. The majority of the excluded employees are in other departments, and, concerning the excluded employees within the transportation department, these excluded employees are not part of the North Drivers.

**2. Skills & Training**

The Employer provides safety training to all new employees. The Employer also mandates an annual safety refresher training. Other trainings that are given to all employees have included trainings about wildfires and COVID.

All drivers—delivery, backhaul, and shuttle—are required to have a CDL in order to driver tractor-trailers. This is a requirement for the job positions as well as a requirement under federal and state regulations. No other positions require a CDL, and no other positions are required to driver tractor-trailers. The Employer additionally requires shuttle drivers to have two endorsements with their CDL: one to transport double trailers (doubles) and one to transport hazardous materials. I take administrative notice of California’s requirements with respect to CDL renewals, which must occur every five years. In order to complete the renewal, drivers must have a qualified medical professional complete certain medical reports and certificates for the driver every two years.<sup>31</sup>

The Employer provides its own certification for using various types of equipment for moving product and pallets: TR jacks, pallet jacks, and forklifts. Drivers are only required to have the Employer’s certification for using TR jacks. Although the Employer’s witnesses testified that some drivers have certifications for pallet jacks and forklifts, the Employer does not require either certification of drivers. All employees in the warehouse department must be certified to use a pallet jack, and all warehouse department employees (except for the loader) must be certified to use a forklift. In the IC/QA department, the quality assurance produce inspector, cycle counters, and driver check-in associate must be certified to use a forklift. In the maintenance department, the record shows that MHE technician Is have certifications for using TR jacks, pallet jacks, and forklifts; however, the record is not clear as whether the other maintenance department positions have these certifications.

Aside from the above certifications for use of the Employer’s equipment, the record contains no substantial evidence that the warehouse and IC/QA employees use specialized skills in the performance of their duties.

Employees in the maintenance department have many required skills and trainings that the other departments need not have; however, the skills and trainings are not uniform across this department. For example, the fleet technician III job description lists the following under “Certifications, Licenses, and/or Registrations:” annual inspector certification knowledge, skills and abilities; brake inspector certification knowledge, skills and abilities; ASE certifications and automotive or medium/heavy duty trucks; and EPA section 608 (Core & Type II) and 609 HVAC & refrigeration certification. MHE technician Is must obtain the Employer’s certification for powered industrial equipment, and they also must maintain a “tech certificate from MHE manufacturer.” Unlike these maintenance technicians, the record shows that the maintenance coordinator does not have specific requirements related to mechanical skills or training.

The router and transportation clerk do not appear to have any skills or training similar to the petitioned-for drivers. However, the router has training in the use of the Employer’s Roadnet program for generating and modifying drivers’ routes, and drivers are not permitted to use Roadnet.

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<sup>31</sup> See <https://www.dmv.ca.gov/portal/dmv-virtual-office/commercial-driver-license-renewal/>.

Based on the above, I find that differences in work skills and training between the petitioned-for and excluded employees weighs in favor of finding that the petitioned-for unit has distinct community of interests from the excluded employees. Here, nearly all excluded employees have required certifications for their positions that the petitioned-for drivers lack. Furthermore, the petitioned-for drivers require a CDL, whereas, with the exception of shuttle drivers, excluded employees do not. Although shuttle drivers also require a CDL, the shuttle drivers have the additional requirements of a doubles endorsement and a hazardous materials endorsement for their CDL.

### **3. Job Functions & Work, Including Overlap**

The excluded positions have job functions that differ from the petitioned-for unit. The principal job functions for each position are explained in the above section on the Employer's operations. Below, I broadly summarize job functions by department, except for the excluded classifications in the transportation department, which I briefly review.

The warehouse department is concerned with the receipt and storage of product, as well as the preparation of product to be transported to customers. All of the positions in this department relate to these three functions.

One area of overlap between the warehouse and the petitioned-for drivers occurs with the loading of trailers. Although the Employer does not require drivers to assist loaders, the record contains some testimony that a driver may voluntarily assist the loader who is actively loading the driver's trailer prior to the driver's departure from the warehouse. The warehouse director testified that drivers may assist loaders for a period of time between 5 and 20 minutes. On rare occasions, when the warehouse department is very behind or understaffed, a driver may help a loader for as long as one hour. The frequency with which drivers assist loaders is not specified in the record.<sup>32</sup>

With the exception of the will-call associate, the IC/QA department ensures that received product meets the standards for safety and quality, and that all product under the Employer's control is where it should be and in the proper quantities. The will-call associate differs from overarching goals of the other excluded classifications in this department. Rather than dealing with inventory control or quality assurance, the will-call associate coordinates will-call orders between the Employer's customer service sales team and the warehouse. The will-call associate also interfaces with customers when they arrive at the warehouse to pick up their orders.

The maintenance department ensures that the equipment other employees use, and the spaces where other employees work, are functioning as intended. To this end, these employees do preventative maintenance on all equipment and vehicles, and they repair equipment, vehicles, and facility installations as necessary. The maintenance coordinator ensures that preventative maintenance is done on time and that all maintenance work is tracked.

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<sup>32</sup> The Petitioner's only witness, a former delivery driver who had worked for the Employer from 2013 until about September 2020, testified to never having assisted a loader and never having seen another driver assist a loader.

The excluded employees in the transportation department include the shuttle drivers, the router, and the transportation clerk. Shuttle drivers transport empty trailers to the warehouse and also transport filled trailers to domicile yards. The router generates and modifies all routes for delivery drivers and the backhaul driver. The transportation clerk performs clerical duties for the transportation department, which includes payroll and incentive programs for drivers, reviewing drivers' Drive Cam events, maintaining driver-qualification files, and organizing drivers' daily paperwork.

The record contains some testimony that the delivery drivers occasionally shuttle trailers. However, the only specific example of this consists of a Fresno delivery driver, rather than one of the petitioned-for delivery drivers, shuttling a trailer. Both the petitioned-for drivers and the shuttle drives are required to do a pre-trip inspection of their tractor-trailer and a post-trip inspection.

I also note that the nature of the petitioned-for drivers and shuttle drivers work duties keeps them away from any facility for the vast majority of their workdays.

Based on the above, I find that differences in job functions and work between the petitioned-for and excluded employees weigh in favor of finding that the petitioned-for unit has distinct bargaining interests. Here, nearly all excluded classifications perform distinct tasks from the petitioned-for drivers, and where overlap occurs, the record fails to show that the overlap happens regularly.

#### **4. Contact with Other Employees**

The record shows that the petitioned-for employees have little or no contact with the majority of the excluded employees.

The petitioned-for backhaul driver has some daily contact with receivers in the warehouse department, as the receivers must verify any product that the backhaul driver brings back. Any delivery driver performing a backhaul would also have brief contact with a receiver. Additionally, as noted above, the record contains some testimony that drivers may work alongside loaders to help load a trailer before the driver leaves the warehouse; again, however, the record does not reflect how often this occurs.

The petitioned-for drivers may also have minimal contact with the IC/QA department's driver check-in associates, as those associates receive paperwork, such as invoices, from the drivers. Drivers also inform the associates of any issues that arose during deliveries. The transportation director testified that some senior drivers contact cycle counters when a problem arises with missing product during a delivery; however, other drivers contact their supervisor for this reason instead. The purpose of these calls is to determine if the driver has the product elsewhere in the trailer or if the product was not loaded into the trailer in the first instance. None of these interactions are for substantial amounts of time, lasting only several minutes at most.

Drivers have occasional contact with the maintenance department fleet technicians. Contact between these employees only occurs as needed for drivers to inform technicians of any

problems with their tractors. Drivers do not assist fleet technicians in performing maintenance of repairs. The Board found that drivers who occasionally assist mechanics in repairs, such as holding open roll-up doors, or preventative maintenance, such as testing turn signals, did not have a sufficient community of interest to require mechanics' inclusion into a unit with drivers and dock workers where the all employees washed vehicles, moved trailers in and out of the loading dock area; mechanics had specialized training and skills; and mechanics had separate regular supervision. *Overnite Transportation*, 322 NLRB 347, 347-348 (1996).

The parties stipulated that all employees are invited and encouraged to attend events such as the rodeo, Thanksgiving dinner, holiday party, health and welfare events, and screenings. The stipulation states that "many do" attend these events.

The Employer conducts monthly positive associate relationship (PAR) meetings that involve only the transportation and warehouse departments. The Employer selects various employees to discuss concerns of the frontline employees at a PAR meeting, but the meeting is optional. The Employer rotates participation to new employees every few months. The transportation director testified that, as an example, attendees at a PAR meeting discussed shrink, or anything that negatively affects the Employer's bottom line, and how to avoid shrink.

The Employer also has a safety committee of employees, and the Employer's safety director oversees these meetings. The current safety committee team includes employees from inventory control, maintenance, the inbound warehouse, and the outbound warehouse. The committee performs various tasks, such as reviewing incidents to offer feedback on them and inspecting fire extinguishers, eyewash stations, and showers. No drivers currently participate on the safety committee due to the difficulty of coordinating the drivers' schedules with the meeting.

Here, although the record shows that petitioned-for drivers may meet in PAR meetings with excluded employees, the petitioned-for drivers otherwise have minimal and infrequent contact with the excluded classifications. Based on the above, I find that contact between the petitioned-for and excluded employees weighs in favor of finding that the petitioned-for unit has distinct bargaining interests.

## **5. Functional Integration**

Functional integration exists when employees work on different phases of the same product or as a group provides a service. Here, every employee contributes in some manner to the Employer's service of receiving, storing, packaging, and transporting products to customers. Thus, as the Petitioner points out, all employees are integrated at a macro level.

Although all employees at issue in this case work toward ensuring that the Employer's customers receive product from the Employer's warehouse, the petitioned-for and excluded employees have limited overlapping job functions, largely dissimilar job tasks, and no substantial

contact among each other. The lack of these factors diminishes the weight of functional integration.<sup>33</sup>

## **6. Interchange**

The record contains only one specific instance of temporary interchange between the petitioned-for and excluded employees. The transportation director testified that, in about 2019, a shuttle driver temporarily assumed the duties of a delivery driver based out of Merced after the delivery driver went out from work due to a personal injury for a period of three months.

The record also contains several examples of permanent transfers between the petitioned-for and excluded classifications. The warehouse director testified that, within the past five years, a warehouse employee became a driver after obtaining a CDL. The transportation director testified that approximately 8 to 10 of the current drivers had previously worked in the warehouse, and that 3 of those drivers were hired as drivers through the Employer's warehouse-to-driver program in about 2018 or 2019.

I find that the above-described temporary interchange and permanent transfers slightly weigh in favor of finding that the petitioned-for unit has distinct bargaining interests. In this regard, these are not "the type of periodic temporary transfers or lateral, two-way transfers between departments that may suggest blurred departmental lines and a truly fluid work force with roughly comparable skills." *Hilton Hotel Corp.*, 287 NLRB 359, 360 (1987).

## **7. Terms & Conditions of Employment**

The parties have stipulated that the policies and procedures contained in the employee handbook apply to all associates; the Employer's offered benefits and insurance plans are available to all associates; and the Employer's food safety plan, policies, and procedures apply to all associates. However, I note that the record shows that the petitioned-for drivers have food safety procedures that apply only to them, as their roles in transporting food product is distinct from other employees' roles. Notably, the petitioned-for drivers play a greater role in food safety than shuttle drivers because shuttle drivers are typically not responsible for removing food product from or placing food product into the trailers.<sup>34</sup> Indeed, the Employer's food safety program manager

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<sup>33</sup> Compare *Bartlett Collins Co.*, 334 NLRB 484, 485 (2001) (finding functional integration of mold-cleaning employees and mold-repair employees where the employees' duties were closely related, and the employees regularly interacted while maintaining equipment and communicating through a logbook); and *Transerv Systems*, 311 NLRB 766, 766 (1993) (finding functional integration supported inclusion of bicycle messengers and driver messengers where most deliveries involved both types of messengers, and the messengers had frequent contact with one another).

<sup>34</sup> One of the transportation supervisors testified that approximately one shuttle driver per week may transfer food product from one trailer to another.

testified to performing regular observations of the petitioned-for drivers but not of shuttle drivers because shuttle drivers did not play a “key roll” with respect to food safety.

As noted above, the parties also stipulated that the Employer’s human resources department is involved in and has responsibility for policies and procedures, interviewing, hiring, coaching, and addressing employees’ issues, including performance, discipline, termination of employment, compensation, benefits, investigations, and raises.

The Employer requires all employees to wear an Employer-branded polo or button-up shirt. However, drivers follow a stricter dress code: whereas other employees have a variety of shirts to choose from and may wear their choice of pants or shorts, drivers must wear a specific color of shirt with gray pants or shorts.

Many of the hourly wage rates for the classifications at issue in this case are similar, as seen below.

Position	Starting Rate	Top Out Rate
Cycle Counter	\$18.37	\$24.76
Driver	\$19.00	\$27.83
Driver Check in Associate	\$18.37	\$24.76
Driver, Backhaul	\$19.00	\$27.83
Driver, Shuttle	\$19.00	\$28.20
Forklift Operator, Let Down	\$19.50	\$25.86
Forklift Operator, Putaway	\$19.50	\$25.86
Inbound (Will Call) Selector	\$19.50	\$25.86
Inbound Receiver	\$19.50	\$25.16
Outbound Loader	\$19.50	\$25.86
Outbound Selector	\$19.50	\$25.86
Maintenance Coordinator	\$16.63	\$22.40
Fleet Tech III	\$30.63	\$41.39
QA Produce Inspector	\$18.37	\$24.76
Outbound Warehouse Clerk	\$15.05	\$20.29
Router	\$30.63	\$41.39
Transportation Clerk	\$18.37	\$24.76
Will Call Associate	\$15.05	\$20.80

The Employer’s vice president of operations testified that the MHE technician's range of hourly wage rates, which is missing from the above table, is approximately \$20 to \$25. The two highest hourly wage earners by classification are the router and the fleet tech IIIs, each having a top-out hourly wage rate of \$41.39.

In the above sections on Employer operations and the unit scope, I discussed some details regarding employees’ overtime hours. Warehouse employees work some regular amounts of overtime, with employees getting overtime hours approximately two days each week; however, the exact number of hours of overtime for warehouse employees is not clear from the record. The inventory control supervisor testified that of the IC/QA employees rarely work overtime, but also stated that these employees work overtime approximately twice per week. The record does not disclose whether or how frequently the maintenance employees work overtime. Similarly for the

transportation clerk and the router, the record does not reflect whether they work any overtime hours on a regular basis.

It is notable that, for the petitioned-for drivers and shuttle drivers, overtime laws do not apply to them due to various exemptions under the Fair Labor Standards Act. Additionally, other federal and state regulations limit the number of hours that drivers may drive tractor-trailers, and regulations also mandate that drivers have a minimum number of hours between shifts. The transportation director testified that shuttle drivers work overtime hours about half as much as delivery drivers do.

As already mentioned, the petitioned-for drivers are on their own seniority list—the North Drivers. Overtime assignments are made for the petitioned-for drivers based first on the most senior drivers who have signed up for overtime. If enough drivers do not sign up for overtime, overtime is assigned in reverse order, starting with the least senior drivers. Shuttle drivers have their own separate seniority list, which functions in the same fashion.

These petitioned-for drivers and the shuttle drivers also used their seniority lists for annual job and vacation bids. The routes bids are carried out separately: the petitioned-for drivers bid only on North Driver routes and the dedicated backhaul position, which are all based out of Modesto, Sacramento, or Merced; while shuttle drivers bid only on shuttle routes, which all begin in Fresno, except for a single shuttle route beginning in Modesto. The vacation bids also occur separately, after the route bidding has ended.

The record shows that there are limited circumstances under which the Employer opens up bidding on driver routes to any and all drivers. This occurs when either (1) a route becomes vacant, or (2) the Employer establishes a new domicile yard. One of the transportation supervisors testified that, within the past two to four years, the Employer has opened two new domicile yards, but the record does not disclose which yards these were.

As previously detailed in the section on unit scope, the separate driver seniority lists also appear to play a role in layoffs and furloughs, with the least senior drivers from each list having been laid off or furloughed when these last occurred in March/April 2020.

The record shows that the warehouse has its own seniority lists: inbound (daytime) positions, which include the scheduler, receivers, and forklift putaways; and the outbound (mostly overnight) positions, which include forklift let-downs, selectors, and loaders. The majority of the senior warehouse employees work inbound positions. The warehouse department holds separate bids for inbound and outbound positions. Inbound warehouse employees bid on positions once per year, while outbound warehouse employees bid on positions every six months. These bid processes are limited to the warehouse; that is, only warehouse employees bid on the positions, and warehouse employees do not bid on positions outside of the warehouse department.

The IC/QA department does not perform bids for positions. Individuals hired into a position in that department are hired exclusively for that position, and they would need to apply for any other openings in that same department. IC/QA employees may not switch into other departments unless they successfully apply for a position in another department.

The record does not show whether the maintenance department has a seniority list for any purpose. Similarly, the record does not reflect that the router or the transportation clerk participate in any bid processes.

In addition to their wages, some employees may earn additional pay through incentive programs. The petitioned-for drivers participate in the driver incentive pay (DIP) program. Shuttle drivers do not participate in the DIP program, and one of the transportation supervisors said that delivery drivers typically earn more than shuttle drivers with the addition of the incentive pay. The record does not contain more detail as to how much additional pay drivers may earn through the DIP program.

The only other group of employees who may earn incentive pay is the warehouse department. The warehouse director testified that the warehouse incentive program is called Fusion. The warehouse director testified that a warehouse employee earning \$19 an hour could earn a raise up to \$24.56 an hour through the incentive program.

The record shows that the Employer's drivers, warehouse employees, and IC/QA employees participate in a third incentive program, which is called a "chip" program. Through this program, employees can receive physical chips for their actions, such as being safe or meeting certain performance goals. Employees may accumulate chips and use them to purchase items from an online store.

As noted in the above section on work duties, the vast majority of the workday for the petitioned-for drivers and the shuttle drivers is spent outside of any facility. Specific to the petitioned-for drivers, this results in nearly all breaks and lunches occurring while on the road. By contrast, the shuttle drivers' routes typically put them at the Modesto facility for their lunch breaks. In Modesto, the excluded employees have access to breakrooms in the warehouses—one in the dry/cooler warehouse and one in the freezer warehouse.

Based on the above review of the employees' terms and conditions of employment, I conclude that this factor weighs in favor of finding that the petitioned-for unit has distinct bargaining interests from the excluded employees. Although many terms and conditions are the same across all employees, the petitioned-for drivers have the substantial considerations that are largely unique to them as drivers: (1) a separate driver incentive pay program; (2) state and federal regulations that place special restrictions on their workhours; (3) separate seniority for the purpose of bidding on routes and vacations; and (4) separate seniority for layoff/furlough purposes.

## **8. Supervision**

The petitioned-for drivers are all supervised by the same two transportation supervisors located in Modesto. The record shows that a Fresno supervisor is the sole transportation supervisor for all drivers on Saturdays; however the volume carried by drivers on Saturdays is about eight percent of the total weekly volume, or about 10 routes, and the record does not disclose how many drivers from either the petitioned-for or excluded drivers work on Saturdays. The transportation

supervisors report to the transportation director. The transportation director reports to the vice president of operations.

All shuttle drivers are directly supervised by transportation supervisors out of Fresno, including the single shuttle driver who is based out of Modesto.

The remaining two excluded transportation employees, the router and the transportation clerk, do not report to the transportation supervisors as the drivers do. Instead, these two excluded positions report directly to the transportation director. The transportation director reports to the vice president of operations.

The warehouse department is supervised according to its inbound/daytime employees and its outbound/mostly-overnight employees (outbound selectors work daytime and overnight shifts). For the outbound employees, there are three outbound warehouse supervisors—one for each of the warehouses (dry, cooler, and freezer). These three outbound warehouse supervisors report to an outbound warehouse manager. The outbound warehouse manager reports to the warehouse director. The warehouse director wears two hats: in addition to overseeing all the warehouse operations, the warehouse director is also the immediate supervisor for the inbound warehouse employees. The warehouse director reports to the vice president of operations.

All employees in the IC/QA department report to an inventory control supervisor. The inventory control supervisor then reports to a compliance manager. The compliance manager *does not* report to the vice president of operations. Instead, the compliance manager reports to the Employer's finance department. The record does not disclose the title of the individual who oversees the compliance manager.

The maintenance department employees are typically supervised by a single fleet, facilities, and maintenance supervisor; however, that supervisory position is currently vacant. Consequently, the Employer's vice president of operations, to whom the supervisor would typically report, is currently supervising the maintenance department.

Supervisors have direct control over the employees beneath them, with day-to-day issues being directed to the supervisors. While supervisors of one department do not discipline or direct employees of another department, they may intervene in safety matters at any time. If a supervisor has a concern regarding another department's employee, the supervisor takes that concern to the that employee's supervisor. Also, as detailed earlier in this decision, the transportation supervisors may discipline drivers up through a written warning without any further approval. The record is somewhat unclear as to whether transportation supervisors may suspend drivers, but the supervisors are at least consulted concerning suspensions and discharges.

Based on the above, I find that this factor also weighs slightly in favor of finding that the petitioned-for unit has distinct bargaining interests from the excluded employees. The immediate supervision of the petitioned-for unit is specific to the drivers. However, at least some small number of the petitioned-for drivers—less than 10—are supervised by a Fresno supervisor on Saturdays. Additionally, all transportation supervisors are overseen by the same transportation director.

### **9. The Petitioned-for Unit has Sufficiently Distinct Interests from the Excluded Employees**

Having weighed all of the above factors, I find that the petitioned-for unit shares a community of interest that is sufficiently distinct from the excluded employees. As explained above, nearly all of the factors weigh at least slightly in favor of the petitioned-for unit.

This balancing of the community-of-interest factors demonstrates that the petitioned-for drivers have many interests within the context of collective bargaining that are either wholly unique to them or only shared by one of the excluded classifications. Some of the most apparent interests include the following:

- a separate driver incentive pay program;
- state and federal regulations that place special restrictions on their workhours (shared with the single shuttle driver<sup>35</sup>),
- a separate requirement of maintaining a CDL (also shared only with the shuttle drivers),
- separate seniority for the purpose of bidding on routes and vacations,
- separate seniority for layoff/furlough purposes,
- separate supervisors to work for on a day-to-day basis,
- duties require drivers to be outside of the warehouse facility,
- breaks and lunches are taken away the warehouse and away from any breakroom, and
- duties requiring the drivers to interface with customers (shared only with the will-call associate).

I note, too, that the balancing of factors also reveals that the excluded employees and subsets of the excluded employees have their own unique interests:

- nearly all excluded employees work the entirety of their shifts in the warehouse (the router may work from home),
- safety practices inside the warehouse,
- all the excluded employees have access to the breakrooms,
- all employees between the warehouse (except for the loader) and IC/QA department must be Employer-certified to use a forklift, and
- many employees have similar wage tables (only fleet tech IIIs and the routers have substantially higher hourly wage rates).

I also find that the Board's decision in *Home Depot USA*, 331 NLRB 1289 (2000), is instructive to the present matter. In that case, the Board overruled the determination that a unit of drivers was not appropriate notwithstanding that the drivers shared common supervision and

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<sup>35</sup> As I mentioned above at fn. 25, I have included shuttle drivers for the sake of discussion; however, I have already determined that the Fresno facility need not be included in this multifacility unit.

benefits with other employees, had a degree of overlapping job functions with other employees, and considerable interchange with other employees. The Board found that drivers had a distinct community of interest and constituted an appropriate unit where the drivers required special qualifications and licensing, spent the majority of their time on the road, and had only incidental contact with other employees outside to the drivers' primary job function of operating delivery trucks.

Here, based on the totality of the record, I agree with the Petitioner, and I conclude that the petitioned-for unit of the delivery drivers and the backhaul driver, also known as the North Drivers, is an appropriate one.

#### **D. *Boeing* Step Three: Industry Standards for Appropriate Units**

The Board has no industry-specific standard applicable to this case. Consequently, my findings and conclusions in this matter are based on the balancing of the community-of-interest factors discussed above, and I will direct an election in the petitioned-for unit.

### **IV. ELECTION METHOD**

Below, I review the relevant Board law for deciding the election method during the ongoing COVID-19 pandemic, summarize the parties' positions on the matter, and apply the law to the circumstances of this case. Having carefully considered the matter, I am directing a mail-ballot election.

#### **A. Board Law**

In *Aspirus Keweenaw*, the Board outlined six situations "that will normally suggest the propriety of using mail ballots under the extraordinary circumstances presented by [the COVID- 19] pandemic." Id. slip op. at 4. The six situations are as follows:

- (1) The NLRB office tasked with conducting the election is operating under "mandatory telework" status.
- (2) Either the 14-day trend in the number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher.
- (3) The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size.
- (4) The employer fails or refuses to commit to abide by the GC Memo 20-10 protocols.
- (5) There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status.
- (6) Other similarly compelling considerations.

The Board found that in the presence of any of the above situations, Regional Directors must consider directing a mail-ballot election; however, the presence of any of these situations does not require a mail-ballot election. Furthermore, the Board stated that Regional Directors who direct mail-ballot elections in any of the above situations will not be found to have abused their discretion. Id. slip op. at 8.

## **B. The Parties' Positions**

### **1. The Petitioner's Position**

The Petitioner is agreeable to either a mail-ballot election or a manual election.

### **2. The Employer's Position**

The Employer argues that none of the six factors enumerated by the Board in *Aspirus Keweenaw* apply in the present case.

The Employer also argues that mail-ballot elections diminish voter turnout, citing to numerous recent elections and the percentage of ballots returned in numerous mail-ballot elections.

The Employer generally states that it is able to comply with the provisions of Memorandum GC 20-10, "Suggested Manual Election Protocols" (GC 20-10), as well as with the Center for Disease Control and Prevention (CDC) guidelines for employers to operate during the pandemic. The Employer proposes to hold the election in "an outdoor, erected structure" that will be large enough to ensure social distancing, privacy, and ventilation. The Employer notes that it can place tents outside the Modesto warehouse front door.<sup>36</sup> Alternatively, the Employer proposes that an indoor election may be held in the upstairs training mezzanine of its Modesto warehouse, which can fit 130 people.

## **C. Discussion**

Having considered the Employer's positions and suggested election arrangements, as well as the current circumstances of the COVID-19 pandemic in Stanislaus County, where the Employer's Modesto warehouse is located, I find that a mail-ballot election is appropriate in this matter.

Before considering the application of *Aspirus Keweenaw* to this case, I note my disagreement with the Employer's argument concerning diminished voter turnout. The Board in *Aspirus Keweenaw* specifically spoke to this issue in establishing its guidelines for the use of mail ballots during the pandemic. The Board stated as follows:

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<sup>36</sup> The Employer also proposed placing a tent in front of the stairs that face Dorothy Road, presumably suggesting arrangements for a manual election at the Employer's facility in Fresno. As I have determined that the petitioned-for multifacility unit is appropriate without the inclusion of the Fresno facility, there is no need for a voting poll in Fresno.

To be clear, although the generally lower voter turnout in mail-ballot elections supports the Board's historic preference for manual elections, it is not a relevant consideration in assessing whether a Regional Director has abused his or her discretion by directing a mail-ballot election in a specific case. We also recognize that the very circumstances that ordinarily support conducting a mail-ballot election may affect voter participation.

*Aspirus Keweenaw*, above, slip op. at 2 fn. 6. Consequently, this argument is not persuasive.

Turning to the application *Aspirus Keweenaw* to this case, I agree with the Employer that the first five factors are not present here. First, Region 32 is not on a mandatory telework status.<sup>37</sup> Second, neither the 14-day trend in new confirmed cases of COVID-19 nor the 14-day testing positivity rate in Stanislaus County are trending upward. Third, in reviewing California's industry guidance for logistics and warehousing facilities,<sup>38</sup> I do not find that any constraints would prevent a manual election in the Employer's proposed location. Fourth, the Employer has proposed to comply with the requirements of GC 20-10. Fifth, the record contains no evidence of an outbreak at the Employer's Modesto facility.

As of April 18, 2021, the level of community transmission in Stanislaus County is designated by the State of California as "substantial." Of the total population in Stanislaus County, only 18.8% have been fully vaccinated, with the majority of those being over the age of 65.<sup>39</sup> In these circumstances, despite the absence of any of the above-described *Aspirus Keweenaw* factors, I am concerned regarding the appearance of COVID-19 virus variants in Stanislaus County. On April 8, 2021, the Modesto Bee, a local periodical, reported the first two cases of the South African variant, B.1.351, of the coronavirus were discovered in Stanislaus County.<sup>40</sup> Prior to this, on March 18, public health officials announced that the UK variant, B.1.1.7, was found in Stanislaus County. According to the California Department of Public Health (the CDPH),<sup>41</sup> which cites to the CDC, the B.1.351 variants "are associated with approximately 50% increased transmission" and "[m]ay have moderately decreased response to antibody treatments." The CDPH also states that the B.1.1.7 variants "are associated with approximately 50% increased transmission, ...likely with increased disease severity and risk of death" and "[appear] to have minimal impact on the effectiveness of treatments with antibodies." These variants have mutations in the virus genome that alter the characteristics and cause the virus to act differently in ways that are significant to public health, such as causing more severe disease, spreading more easily

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<sup>37</sup> See <https://www.nlr.gov/field-office-status>.

<sup>38</sup> See <https://files.covid19.ca.gov/pdf/guidance-logistics-warehousing--en.pdf>.

<sup>39</sup> See <https://covid.cdc.gov/covid-data-tracker/#county-view>.

<sup>40</sup> See <https://www.modbee.com/news/coronavirus/article250520289.html>.

<sup>41</sup> See <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID-Variants.aspx>.

between humans, requiring different treatments, and changing the effectiveness of current vaccines.<sup>42</sup>

As these variants are present in Stanislaus County and have been identified by the CDC as variants of concern in the United States, the more prudent course of action would be to use the available alternate method to conduct a manual election. Given the increased chance of transmission and lethality of these variants, I find that the presence in Stanislaus County of these COVID-19 variants constitutes a compelling consideration under the sixth factor of *Aspirus Keweenaw* and warrants a mail-ballot election in this matter.

For the above reasons, I am directing a mail-ballot election in this case.

## V. CONCLUSIONS

Based on the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.<sup>43</sup>
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

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<sup>42</sup> See <https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant-cases.html>.

<sup>43</sup> During the hearing the parties stipulated to the following commerce facts:

The Employer, SYSCO CENTRAL CALIFORNIA, INC., a California corporation with an office and place of business in Modesto, California, has been engaged in the business of the wholesale marketing and distribution of food service products. During the past 12 months, the Employer, in the course and conduct of its business operations, purchased and received goods or services valued in excess of \$50,000 from suppliers located outside the State of California.

**Included:** All full-time and regular part-time delivery drivers and backhaul drivers employed by the Employer at its facilities located in Modesto, Sacramento, and Merced, California.

**Excluded:** All other employees, confidential employees, managers, guards, and supervisors as defined by the National Labor Relations Act.

### **DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **TEAMSTERS UNION LOCAL 386, INTERNATIONAL BROTHERHOOD OF TEAMSTERS**.

#### **A. Election Details**

I have determined that a mail ballot election will be held. Petitioner has not waived the ten days it is entitled to have the voter list described below.

The ballots will be mailed to employees employed in the appropriate collective-bargaining unit. At **5:00 p.m. on May 4, 2021**, ballots will be mailed to voters from the National Labor Relations Board, Region 32, 1301 Clay Street, Suite 300-N Oakland, CA 94612-5224. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by May 11, 2021, should communicate immediately with the National Labor Relations Board, Region 32 Office at **(510) 637-3300** or Nicholas L. Tsiliacos at (510) 671-3046.

**All ballots will be commingled and counted at the Regional Office on May 26, 2021.<sup>44</sup>** In order to be valid and counted, the returned ballots must be received in the Regional Office prior to the counting of the ballots.

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<sup>44</sup> If, on the date of the count, the Regional Office is closed, or the staff of the Regional Office is working remotely, the count will be done remotely. If the Regional Director determines this is likely, a reasonable period before the count, the parties will be provided information on how to participate in the count by videoconference.

## **B. Voting Eligibility**

Individuals eligible to vote are those in the unit who were employed during the payroll period ending **Sunday, April 11, 2021**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

## **C. Voter List**

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **April 23, 2021**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015](http://www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015).

The list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list must be electronically filed with the Region by using the E-filing system on the Agency's website at [www.nlr.gov](http://www.nlr.gov). Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the

failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

#### **D. Posting of Notices of Election**

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

#### **RIGHT TO REQUEST REVIEW**

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to [www.nlrb.gov](http://www.nlrb.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under

review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated at Oakland, California, this 21st day of April 2021.

/s/ Valerie Hardy-Mahoney

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